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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1269

JOHN L. BARRY, Commissioner of the SUFFOLK COUNTY POLICE DEPARTMENT,

Petitioner,

against

THOMAS DWEN, as President of the Suffolk County Patrolmen's Benevolent Association and THOMAS DWEN, Individually,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF

HOWARD E. PACHMAN
Suffolk County Attorney
Attorney for Petitioner
Office and P. O. Address
H. Lee Dennison Executive Office Bldg.
Veterans Memorial Highway
Hauppauge, New York 11787
Telephone: (516) 979-2485

PATRICK A. SWEENEY
Of Counsel
691 Fort Salonga Road
Northport, New York 11768
(516) 757-6515

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The first opinion of the District Court for the Eastern District of New York is printed in the Appendix of the petition for certiorari at p. 19a and is reported in 336 F. Supp. 487. The opinion of the Circuit Court of Appeals is printed in the Appendix of the petition for certiorari at p. 9a and is reported in 483 F. 2d 1126. The second opinion of the District Court is printed in the

Appendix of the petition for certiorari at p. 5a and is unreported. The judgment without opinion of the Second Circuit Court of Appeals is printed in the Appendix of the petition for certiorari at p. 2a.

The conflicting opinion of *Stradley* v. *Anderson,* 478 F.2d 188 is printed in the Appendix to the petition for certiorari at p. 23a and the District Court opinion of *Stradley* v. *Anderson,* 349 F.Supp. 1120 is printed in the Appendix to the petition for certiorari at p. 29a.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on January 9, 1975 (Pet. for Cert. p. 2a). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1) and Rule 19 (1) (b) of the Supreme Court Rules.

Question Presented

Whether a police department may constitutionally regulate the length of hair of individual police officers based upon the legitimate state interest of either safety and/or the morale factor of maintaining uniformity of discipline and appearance in a quasi-military organization such as the Suffolk County Police Department.

Statute Involved

The statutory provision involved is the Constitution of the United States, Amendment XIV, Section 1, U.S.C.A. Const. Amend. XIV, Section 1. The section is printed in the petition for certiorari at p. 1a.

Statement

By service of an order to show cause dated August 4, 1971, together with a summons and complaint, an action

was commenced in the United States District Court for the Eastern District of New York to enjoin John L. Barry, Commissioner of the Suffolk County Police Department, from enforcing General Order No. 71-1 which involved grooming standards for police officers. More particularly, the rule involved certain guidelines as to the length of a police officer's hair as well as regulating the growth of mustaches, beards and sideburns. The action had been commenced in the Federal District Court on the basis that the plaintiff's rights of free expression, due process and equal protection as provided in the First and Fourteenth Amendments of the United States Constitution had been violated.

By memorandum of decision and order dated November 8, 1971, Chief Justice Mishler of the District Court denied a motion for a preliminary injunction enjoining the Commissioner of the Suffolk County Police Department from enforcing the regulation. The Court held that uniformity of dress is part of the discipline of the local police department and a visible sign of the presence of the law. The Court further held that regulations involving dress and grooming should be left up to officials who are aware of local customs and taboos and not to the Courts.

On November 30, 1971, by memorandum of decision and order, the Hon. Jacob Mishler dismissed the complaint based upon his decision and order dated November 8, 1971. Thereafter, on December 6, 1971, plaintiff filed a notice of appeal to the United States Circuit Court of Appeals for the Second Circuit from both memorandum decisions and orders of the Hon. Jacob Mishler.

On August 22, 1973, the United States Court of Appeals for the Second Circuit reversed the decisions and orders of the Hon. Jacob Mishler and remanded the case to the District Court for trial. The Second Circuit Court of Appeals held that the choice of personal appearance is an ingredient of an individual's personal liberty and any

restriction on that right must be justified by a legitimate state interest. The Court further held that there is a substantial constitutional question raised by the regulation of the plaintiff's hair length. Since the Court felt that there had not been a significant justification presented in the affidavit and supporting papers submitted in the District Court as to a legitimate state interest, the Second Circuit Court remanded the case for trial of the issues of fact, stating that the burden of proof was on the Commissioner at trial.

A plenary hearing was held before the Hon. Jacob Mishler on April 3, 1974 and as a result of that hearing, by memorandum of decision and order dated May 30, 1974, the Hon. Jacob Mishler granted judgment in favor of the plaintiffs declaring the hair regulation of the Suffolk County Police Department unconstitutional in that it violated the due process clause of the Fourteenth Amendment because the defendant Commissioner had failed to establish a legitimate state interest requiring hair length restrictions on members of the police department. A judgment was entered on June 19, 1974 permanently enjoining the Suffolk County Police Commissioner from enforcing the hair regulation and declaring the Rules of the Suffolk County Police Department with respect to same unconstitutional. On June 18, 1974 a notice of appeal was filed by the defendant Police Commissioner from said judgment to the United States Court of Appeals for the Second Circuit.

By order dated January 9, 1975, based upon the transcript of the record from the United States District Court for the Eastern District of New York, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court without opinion.

Summary of Argument

The Suffolk County Police Department by its previous Police Commissioner, John L. Barry, amended Chapter 2 of the Rules and Procedures of the Suffolk County Police Department to include a regulation as to grooming standards to be adhered to by individual police officers effective August 1, 1971 (A. 57-58). The regulation governed the length of hair the individual police officer could have on his head as well as the growth of beards, mustaches and sideburns. The regulation also stated that members of the force shall be neat and clean at all times. Specific standards for the length of hair followed the general clause as to maintaining neatness and cleanliness. The regulation was eventually amended effective November 15, 1973 with respect to sideburns, mustaches and the length of hair on the head (A. 48). The avowed purpose of the amendment as stated in Special Order No. 2-2.16 was an effort by the new Commissioner of Police to allow individual officers to conform to the general change of men's hairstyles.

The plaintiff, Thomas Dwen, complains not of the reasonableness of the regulation or the amendment thereto, but rather the right of the Police Commissioner to issue any grooming standards with respect to hair whether it be on the head or facial. He does not complain of that portion of the regulation which states that an officer shall be neat and clean at all times. The assertion in the complaint filed in the District Court is that to impose any restriction on his hair length violates his right of free expression, due process and equal protection as provided in the First and Fourteenth Amendments to the Constitution of the United States (A. 62).

Taking Mr. Dwen's claims in order, then, one must consider if the regulation violated Mr. Dwen's right of self expression or speech as enunciated in the First Amendment. A look at the record which was before the District Court

for the Eastern District of New York and the Second Circuit Court of Appeals discloses that there was no semblance of evidence advanced by Mr. Dwen as to *how* the regulation violated his First Amendment rights. Nothing in the complaint specifically states how he wished to express some idea or thought by the wearing of hair longer than the regulation would permit. No testimony was *ever* advanced by Mr. Dwen (neither he nor anyone ever testified in the case on plaintiff's behalf (A. 39) as to a symbolic speech argument similar to that advanced by the students who wished to wear black arm bands in *Tinker* v. *Des Moines School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed. 2d 731 (1969). Thomas Dwen simply wants to subjectively govern his own appearance with respect to hair. Since he advanced no other reason for a first amendment right this court cannot conclude that his personal preference for hair length is a First Amendment right. Indeed, the 2d Circuit did not seriously give credence to such an argument (cert. 17a). Nor did Justice Mishler in his second opinion when he declared the regulation unconstitutional (cert. 8a).

The second assertion by Thomas Dwen is that the choice of his personal appearance was governed by the due process clause of the Fourteenth Amendment. The Second Circuit agreed with him as their argument (cert. 17a) and the second decision by the District Court is based upon this amendment (cert. 8a). The rationale of the District Court and the Second Circuit Court of Appeal is that the due process clause of personal liberty of the 14th Amendment protects the police officer from arbitrary infringement on his personal liberty to choose any hair length he desires.

The so-called "liberty" of the choice of personal appearance is being equated by the court to a fundamental liberty equivalent to e.g., the right of marital privacy. It is the position of the Commissioner of the Suffolk

County Police Department that at best the choice of personal appearance can only be considered a lesser liberty and does not rank in the order of the right of privacy or freedom of speech. In interpreting the present regulation then, the Police Commissioner is at least afforded the presumption of regularity and honest motivation which generally would attach to his official acts. Even if challenged in Court as to the reasonableness of the regulation, the Commissioner's only burden would be the "rational relationship" test which certainly affords the individual police officer the protection under the Fourteenth Amendment from the arbitrary interference of the Police Commissioner into his personal choice of appearance (See *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563). Using that rationale, the arguments advanced below by the Commissioner that the legitimate state interest he sought to promote of having uniformity of morale and discipline in the ranks and also advancing safety for the officer should, under the "rational relationship" test have been sufficient to sustain the intended objectives. Looking at the record, the Police Commissioner showed a relationship between the rule and its objectives and it was then incumbent upon Thomas Dwen to show the regulation was arbitrary and capricious. Since he did not do so, the complaint should have been dismissed.

Further, there were mere conclusory allegations stated in the complaint as to the unconstitutionality of the regulation. The regulation should have been accorded the presumption of constitutionality which is afforded the majority of administrative regulations or to statutes in general. (McKinney's Statutes, ¶ 150.) The mere assertion of unconstitutionality should not be enough to shift the burden of proof upon a municipality to prove that a regulation of one of its departments *is* constitutional.

There are very few areas where this Court has seen fit to shift the heavy burden of proof upon municipalities to show that a statute or rule is in effect constitutional and those cases have only been where fundamental rights such as freedom of speech, press or assembly or other fundamental liberties guaranteed citizens under the Fourteenth Amendment have been at issue. The grooming of hair is not such a fundamental constitutional right as to be governed by any of the amendents.

The fundamental right, if anything, is that the State should not arbitrarily interfere with the personal appearance of its citizens. No serious claim was made by Thomas Dwen as to the arbitrariness of the regulation as it applied to him or any other member of the police force.

Lastly, Thomas Dwen asserted that the grooming regulation violated his right to equal protection under the laws. Admittedly the hair regulation only applies to males but no argument was made by Mr. Dwen as to *how* he was denied equal protection.

Even if this court were to deem the length of hair to be such an ingredient of personal liberty as to be a substantive constitutional right as the Second Circuit Court of Appeals deemed it to be (cert. 17a), the arguments by the police Commissioner as to the legitimate State interest sought to be promoted should have also been sufficient for the Circuit Court to dismiss the complaint. The reasoning of the Court in *Stradley* v. *Anderson* (cert. 27a), i.e., that uniformity in grooming is a legitimate State interest certainly showed the weight of the State's interest over the individual police officer's choice of personal appearance. Safety was another legitimate state interest advanced by the Police Commissioner. Both of those interests outweighed the interest of the individual police officer even if

one interprets the choice of personal appearance as a substantive right.

Presently, there is an evolving rule in the Federal Courts concerning the abstention of the Federal Courts from interfering with matters which are being resolved in the State Courts in certain matters where the jurisdiction of the State and Federal Courts are concurrent. As a matter of comity, because of the decision in *Greenwald* v. *Frank*, 70 Misc. 2d 632, 334 N.Y.S. 2d 680, affd. 40 A. D. 2d 717, 337 N.Y.S. 2d 225, affd. 32 N. Y. 2d 862, 346 N.Y.S. 2d 529 (1973), wherein an identical hair regulation was involved, the Federal Court should have refrained from deciding the issue anew. The State Courts had treated the personal choice of hair appearance as not a fundamental liberty but, rather, a lesser liberty and they had by their decisions resolved the issue as to all police departments in the State of New York. When the Appellate Division, Second Department stated that the case did not rise to the dignity of constitutional issue they were implicitly stating the choice of hair grooming was not a fundamental liberty. Their decision was unanimously upheld by the Court of Appeals of the State of New York (*Greenwald* v. *Frank, supra*).

Finally at issue was the quasi-military nature of a police force such as the Suffolk County Police force. The cases dealing with hair involving the military have been resolved in favor of the military. The police commissioner does not advance the argument that the choice of personal appearance with respect to hair is to be completely surrendered as in the military cases, but merely modified and always be subject to the rationality test in the Courts. This is the extent the military cases have application to the argument that since the Suffolk County Police Department is *quasi* or *semi* or *para* military in nature—the reasoning and logic of the military cases apply solely

to the extent of allowing a certain amount of discretion in the police commissioner to regulate the grooming standards for individual police officers—including the regulation of hair length.

ARGUMENT

I

The grooming of hair is not such a substantial right as to fall within the penumbra of specific guarantees of the Bill of Rights and the constitutionality of the hair regulation should have been accorded the rationality test rather than the heavy burden of showing a compelling State interest.

Circuit Judge Smith, in writing the opinion for the Second Circuit, first states that there is a substantial constitutional issue raised by the regulation of Thomas Dwen's hair length. He then goes further to say the *choice of personal appearance* is an ingredient of an individual's personal liberty. The court further discusses the differentiation between fundamental personal liberties (e.g., freedom of speech, press, etc.) and those liberties it refers to as ". . . less significant personal decisions . . ." (cert. pp. 16a and 17a). The court concludes that even in these areas the interference or limitation on the choice of personal appearance must be justified by a legitimate state interest. The burden of proof then is placed upon the state to show that *its* action is not arbitrary, purposeless and legitimate.

A distinction must necessarily be made between basic fundamental rights as guaranteed by the various amendments and other less important rights. If, the regulation of one's hair length is part and parcel of the choice of

personal appearance —as the Circuit Court indicates—and further, that right is protected by the Fourteenth Amendment, does it not become by virtue of that reasoning a fundamental right? After all, even though the Circuit Court seems to indicate that the choice of one's personal appearance is not as significant as fundamental rights, nevertheless they are stating the Fourteenth Amendment protects the right of appearance. With that reasoning I wholeheartedly disagree and the Circuit Court was in error in coming to such a conclusion.

The choice of one's personal appearance as applies in the instant case is not such a substantial issue as to rise to the protection of *any* of the amendments. The present case involves the regulation of the length of hair of police officers. Undoubtedly, the issue comes up as to whether or not the hair length of any individual may be regulated or is the length of hair protected by the Constitution?

The regulation in question does not prohibit the growth of hair but merely its length. Hair is as fundamental to the human anatomy as almost any part of the body. The regulation does not seek to deprive the individual police officer of his hair by, in effect, plucking it from his body. The regulation merely refers to the grooming of the hair. The regulation as to grooming has no more significant impact on the individual police officer as his being requested to bathe frequently, cut and clean his fingernails, keep his uniform cleaned and pressed, etc.

While the instant case has become somewhat of a leading case concerning police hair length cases, there have been numerous decisions concerning the issue of hair itself and whether it is constitutionally protected, and, if so, by what amendment? The argument has been advanced that the grooming of hair is protected by the First

Amendment and some courts have so held (See *Breen* v. *Kahl*, 419 F. 2d 1034 at 1036 (7th Cir. 1969), cert. denied 398 U.S. 937, 90 S.Ct. 1836, 26 L.Ed. 2d 268, citing *Griswold* v. *Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965), but other courts have held it is not so protected (See *Ferrell* v. *Dallas Independent School District*, 392 F. 2d 697 (5th Cir. 1968), cert. denied 393 U.S. 856, 89 S.Ct. 98, 21 L.Ed. 2d 125; *Karr* v. *Schmidt*, 460 F. 2d 609 (5th Cir. 1972); *Jackson* v. *Dorrier*, 424 F. 2d 213 (6th Cir. 1970), cert. denied, 400 U.S. 850, 91 S.Ct. 55, 27 L.Ed. 2d 88; *Freeman* v. *Flake*, 448 F. 2d 258 (10th Cir. 1971), cert. denied, 405 U.S. 1032, 92 S.Ct. 1292, 31 L.Ed. 2d 489.

The respondent Thomas Dwen, as President of the Suffolk County Patrolmen's Benevolent Association and by himself individually, stated in both his complaint (A. 62), and in his affidavit for an injunction (A. 66) that the police department's grooming regulation with respect to hair violated his rights under the First and Fourteenth Amendments to the Constitution because the ". . . said rules and regulations are not based upon the generally accepted standard of grooming in the community and that it places an undue restriction upon the plaintiff in his activities in the community" (A. 62).

First then, is Thomas Dwen's hair length protected by the First Amendment? From a reading of those cases dealing with First Amendment rights, one must conclude that the answer to this question is in the negative.

The First Amendment to the Constitution of the United States states as follows:

> "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or *abridging the freedom of speech* or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
>
> (U.S.C.A. Const. Amend. 1) (emphasis supplied)

A reading of the record in the instant case discloses that there was never an assertion by the plaintiff Thomas Dwen that the wearing of long hair was intended as an expression or point of view which, conceivably, may have brought the issue under the protection of the First Amendment. An oft cited case for the position that length of hair is protected by the freedom of speech provision of the First Amendment is that of *Tinker* v. *Des Moines School Independent Community District*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969). In that case three students were suspended from school because they wore black armbands to show their objection to the Viet Nam War. This court held, in substance, that the wearing of armbands was the expression of an idea or point of view in line with free speech and hence constitutionally protected. The court in that case did state that:

> "The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to *hair style*, or deportment." (emphasis supplied) 393 U.S. 503, at 509, 89 S.Ct. 733, at 737, 21 L. Ed. 2d 731.

The issue in that case is distinguishable from the grooming regulation of the Suffolk County Police Department. The regulation's intent was twofold: for uniformity of morale and for safety. The individuals who wish to wear their hair longer than the regulation are not expressing an idea akin to free speech, as were the three students with armbands. It is merely a difference of opinion on grooming standards between the individual police officer and the management of the police department as represented

by the Police Commissioner. That difference of opinion does not rise to a substantial Federal question any more than the regulation of the color of the uniform, the style of the uniform, the color of socks, etc. Indeed ". . . if we are to have workable rules of constitutional law, the validity of the regulation cannot turn on the plaintiff's subjective motivation in wearing his hair long." *Karr* v. *Schmidt,* 460 F. 2d 609, 614 (5th Cir. 1972). Thomas Dwen's reason for the growth of hair is similar to that advanced by the student in *Karr* v. *Schmidt, supra,* p. 614, in that he simply likes his hair long. The court in that case decided that the wearing of long hair does not, in and of itself, contain such communicative content as to entitle it to First Amendment protection and cites the Supreme Court in the case of *United States* v. *O'Brien,* 391 U.S. 367, 376, 88 S. Ct. 1673, 1678, 20 L. Ed. 672, wherein the court stated:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."

Now, even if the grooming of hair does not fall within the First Amendment, does it fall within any other provision of the Bill of Rights? Several Courts, while holding that the wearing of hair is a substantive constitutional right, are divided on the source of that protection. (*Breen* v. *Kahl,* 419 F. 2d 1034 (7th Cir. 1969), Cert. Denied 398 U.S. 937, 90 S. Ct. 1836, 26 L. Ed. 2d 268, stating the source as either a First Amendment penumbra or an additional fundamental right from the Ninth Amendment or a non-enumerated right as, e.g., the right of privacy available to the States through the Fourteenth Amendment; *Richards* v. *Thurston,* 424 F. 2d 1281 (1st Cir. 1970), the source being the Fourteenth Amendment's liberty clause; *Massie* v. *Henry,* 455 F. 2d 779 (4th Cir. 1972), Fourteenth Amendment due process clause; *Dunham* v. *Pulsifer,* 312 F. Supp.

411 (D.C. Vt. 1970), citing the First and Ninth Amendments; *Bishop* v. *Colaw,* 450 F. 2d 1069 (8th Cir. 1971), source being the Ninth Amendment.) All of these cases involved a student's rights to govern his own hair length and not have to conform to a regulation on the length of his hair promulgated by a school board.

While one may argue that what difference does it make which amendment the right to have hair grow at any length one chooses, it may be indicative of the tenuous nature of the "right". (*King* v. *Saddleback Junior College,* 445 F. 2d 932, 938 (9th Cir. 1971), Cert. Denied 92 S. Ct. 342, 703, 404 S. Ct. 4979, 1042, 30 L. Ed. 2d 294, 736.) A number of courts have ruled that hair length in and of itself is not a substantive Federal right and does not fall within the penumbras of the Bill of Rights (*King* v. *Saddleback Junior College, supra; Ferrell* v. *Dallas Independent School District* (5th Cir.), 392 F. 2d 697, Cert. Den. 393 U.S. 856, 89 S. Ct. 98, 21 L. Ed. 2d 125; *Jackson* v. *Dorrier* (6th Cir.), 424 F. 2d 213, Cert. Denied 400 U.S. 850, 91 S. Ct. 55, 27 L. Ed. 2d 88; *Freeman* v. *Flake* (10th Cir. 1971), 448 F. 2d 258, Cert. Denied 405 U.S. 1032, 92 S. Ct. 1292, 31 L. Ed. 2d 489). While no specific section of the Fourteenth Amendment is mentioned by the plaintiff Thomas Dwen, it can be gleaned from the facts of the instant case that the claim of violation of the Fourteenth Amendment stems from the language which states that:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . ."

As the Second Circuit opinion reads, there was a violation of this section because it found that personal appearance was an *ingredient* of personal liberty and the State (the police commissioner) was in effect depriving the plaintiff of his liberty arbitararily (cert. p. 17a). It is significant that the court stated that the choice of personal appearance was an ingredient of personal liberty and did not say that

personal appearance *is* a liberty. As Circuit Judge Morgan wrote in the majority opinion in *Karr* v. *Schmidt, supra,* p. 615,

> "We think it plain that individual liberties may be ranked in a spectrum of importance. At one end of the spectrum are the great liberties such as speech, religion and association specifically guaranteed by the Bill of Rights. Of equal importance are liberties such as the right of marital privacy that are so fundamental that, even in the absence of a positive command from the Constitution, they may be restricted only for compelling state interests. At the other end of the spectrum are the lesser liberties that may be invaded by the state subject only to the same minimum test of rationality that applies to all state action."

Since the Circuit Court did not conclude that the choice of personal appearance was in and of itself a fundamental liberty, but was merely an ingredient, if anything, the "right" would be on the lower end of the spectrum and not be classified a fundamental liberty. In that case, the State should not have had the burden of proof placed upon it to show a compelling state interest. The regulation should not have been *presumed* unconstitutional. The burden should have remained with the plaintiff to *prove* arbitrariness and not for the defendant to show it was not arbitrary. The Circuit Court was intervening in an area where it should have abstained, i.e., the running of a police department, because absent a fundamental right, the better course would have been to restrain from interference.

Indeed, an identical hair regulation of the sister county of the County of Suffolk, Nassau County, was proceeding through the State courts and by the time the Second Circuit was ready to rule on the matter, the State's highest court had affirmed an Appellate Division ruling which upheld the regulation as being modest and not rising to the dignity of a constitutional issue. (See *Greenwald* v. *Frank, supra.*)

The Second Circuit's opinion as to the burden of proof was erroneous.

> "State regulations which do not affect fundamental freedoms are subject to a much less rigorous standard of judicial review than is applicable when fundamental rights are at stake. In such cases, the appropriate standard of review is simply one of whether the regulation reasonably intended to accomplish a constitutionally permissible state objective." (*Karr* v. *Schmidt, supra,* p. 616) (See e.g. *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 491, 75 S.Ct. 461, 99 L.Ed. 563, 574, *Ferguson* v. *Skrupa,* 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed. 2d 93 (1963).

If there is no place in the Bill of Rights to insert the so-called right to have one's hair any length, then obviously it is not a constitutional protected right. At issue here is not the right to grow but rather the State's right to regulate the grooming of hair of individual police officers. Similarly in the school cases, it was argued that school authorities had the right to regulate grooming of hair. The most one could argue is that the right would be similar to the right of marital privacy which while not enumerated in the Bill of Rights is a right older than the Bill of Rights (See *Griswold* v. *Connecticut,* 381 U.S. 479, 486). If that be so, then choice of personal appearance would be the "right" and not the length of hair. A police officer could not be required to wear a blue uniform because it would initially violate a substantial constitutional right. What is the rationale for the uniform but appearance? We are not dealing with a regulation which the government has chosen to compel all citizens to comply with, i.e., for each and every citizen to get his hair cut. We are specifically dealing with a police department and the power of the commissioner of that police department over the personal attitudes of his men.

If the choice of personal appearance is a constitutionally protected right then the "right would have to include the police uniform and all its attributes." To say that the choice of personal appearance only relates to the length of hair would be absurd. To sustain the choice of personal appearance as a fundamental constitutional right of the police officer would advance all types of spurious litigation as evidenced by a suit recently brought in the State Courts in New York State as to the wearing of nameplates by police officers while on duty. The claim was made that the wearing of the nameplate violated the individual officer's right of privacy. The court in that case correctly held that no right of privacy was violated as there was no right because—

> "Exposure of the self to others in varying degrees is concomitant of life in a civilized community" (*Time* v. *Hill,* 385 U.S. 374, 388). As stated by the court in *Rosenberg* v. *Martin,* 478 F. 2d 520, 524-525 (2d Cir. 1972), cert. den. 414 U.S 872—"Thus far only the most intimate phases of personal life have been held to be protected under the Constitutional right to privacy."
>
> *Cooke* v. *Police Dept. City of New York,* 45 A.D. 2d 486, 488; 359 N.Y.S. 2d 672 (1975).

The point is that the grooming of hair is no different from being required to wear a certain color uniform or a nameplate if required, or a specified hat. The grooming of hair is no more a substantial issue than it would be for this court to rule that the choice of clothing is such a personal substantial right that it is protected under the Bill of Rights and to overcome or infringe on the individual the Police Commissioner would have the heavy burden of showing public need. If that be the case, the uniformed police force as presently exists would be virtually destroyed because of the subjective personal appear-

ance whims of a few. The obvious disastrous effect of such a situation cannot be ignored and must be deemed a sufficient state interest to outweigh an individual's personal preference when he is employed as a police officer.

In evaluating the Circuit Court of Appeals cases dealing with hair, one cannot equate the school cases to a case involving police officers. The Eighth Circuit for instance, in *Bishop* v. *Colau,* 450 F. 2d 1069 (8th Cir. 1971), upheld the right of student to wear his hair to school any way he chose. The same court in *Stradley* v. *Anderson,* 478 F. 2d 188, has decided in weighing the competing interests of the individual police officer and the interests of an effective police force that there is a legitimate state interest in allowing police departments to have such regulations. "Unlike the school cases, those officials who have spent their lives in police work, who are trained in law enforcement discipline, possess far better empirical judgment of what is essential to achieve an efficient and disciplined police force than the officers themselves, the public or the predeliction of individual judges" (cert. p. 28a).

In the instant case, the first paragraph of the regulation states that each officer should be neat and clean (A. 57). If one carries the fundamental liberty argument to its extreme, the police commissioner would not be allowed to enforce basic cleanliness grooming without proving a legitimate State interest each and every time. Under the reasoning of *Stradley* v. *Anderson, supra,* such problems are avoided because even if one interprets the choice of grooming as a personal right, the degree of appearance ". . . as long as it is not arbitrary or unreasonable, should not be the court's concern . . ." (*Stradley* v. *Anderson,* cert. 28a).

II

Assuming *arguendo* that an individual police officer's hair grooming is a personal right protected under the Constitution, the petitioner's interest in effective law enforcement outweighs the individual's rights because uniformity of grooming as part of uniform regulations and safety are equally legitimate State interests.

The Circuit Court of Appeals for the Second Circuit has stated that the choice of personal appearance is an ingredient of an individual's personal liberty (cert. 17a). In discussing this right, the Court referred to a number of cases discussing which Amendment of the Constitution the right emanates from. The Court concluded that in their opinion the right was based on the guarantee of the Fourteenth Amendment ". . . of personal liberty of a rational continuum which, broadly speaking, includes a freedom from all substantial, arbitrary impositions and purposeless restraints . . . *Poe* v. *Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J. Dissenting) . . ." (cert. 17a). Assuming arguendo, the Second Circuit was correct, then their further reasoning would follow also that to restrict an individual's right the State (in this case the Police Commissioner) should justify a hair regulation by a " . . . legitimate State interest reasonably related to the regulation" (cert. 17a).

The Police Commissioner has advanced two arguments as to what is the legitimate State interest. First, the argument is made that uniformity in grooming as part of uniform regulations by members of the Suffolk County Police Department *is* a legitimate State interest. The police officer is required to wear a uniform and the color, style and material is governed by the Police Department since the individual is *given* the uniform to wear and is *required* to wear the uniform (A. 18). Part of that uniform is a hat, which must also be worn (A. 19).

Appearance of a police officer is essential to proper law enforcement since the uniformed police officer is the very symbol of our laws and the visible sign of law enforcement. The impression the individual officer gives the public is extremely important to the effectiveness of any police force. Now if one isolates grooming of hair from the uniform, then an individual officer would apparently, under the reasoning of the Second Circuit Court, be able to constitutionally personally groom himself in any manner he sees fit. If the officer does not maintain his uniform, i.e., does not have it cleaned and pressed occasionally or comes to work with a two or three-day beard growth or does not bathe frequently, this too would have to be constitutionally protected—unless the interest of the State outweighs that individual officer's right to personally groom himself. The regulation in question speaks not only of hair but also that members of the force be neat and clean (A. 57).

The legitimate State interest that there must be uniformity of grooming goes to the essence of police work. A police department is judged as a whole by the public upon the individual police officer's personal experiences with the public. To that end, regulations governing the officer's conduct with reference to personal appearance, attitudes and conduct must be formulated by each police department. Appearance of the individual officer is essential to the image of the entire police department. It has a bearing on the morale of the individual officer, on the espirit of the police force, and on the individual citizen's reactions. Personal cleanliness are part and parcel of the uniform concept, and it is ordinary and usual for police departments to have regulations that officers shave daily, bathe frequently, clean and trim their fingernails, shine their shoes, take care of their clothes and have their hair trimmed, cut or groomed periodically. (See Police Administration, O. W. Wilson, 2d Edition pp. 186-187.)

> "The patrol officer in any city is the most visible representative of government. Usually in a motor vehicle,

sometimes on foot, he patrols a specific area, responds to calls for service, and maintains order in the community. Unlike a specialist or a technician, a patrol officer must be proficient at a variety of tasks rather than skilled in a limited field. Although he is not a supervisor in the organizational sense, he is responsible for the safety and direction of hundreds of people each day." (Report on Police, National Advisory Commission on Criminal Justice Standards and Goals, 1973, p. 192.)

The grooming of the individual police officer whether it be the cleaning and pressing of the uniform, the cleaning of his fingernails *or* the cutting of his hair is part of the concept of projecting to the public a *uniform* police officer as the representative of government.

> "Every citizen has the right and the need to be able to recognize a uniformed police officer on sight. Moreover, the necessary police prerogative of temporarily restricting the freedom of individuals under certain conditions demands that citizens in such situations be informed as to the identity of the officer and the police agency he represents. The police uniform affords the easiest and most direct means of satisfying all these identification requirements." (Report on Police, *supra*, p. 517.)

And further that

> "Uniform regulations should be enforced within an agency by a continuing program of inspection and control to insure compliance by all officers. This can be accomplished by supervisors conducting daily uniform inspections of the officers of each watch or shift. Many agencies do this during watch briefing or rollcall. Supervisors, when they notice deficiencies in the appearance of a subordinate, should routinely inform the officer that his uniform is unauthorized, in need of repair, or otherwise unpresentable. It should be emphasized to all officers that their appearance says much about themselves, their agency, and their regard for the public trust they hold." (Report on Police, *supra*, p. 518.)

This reasoning, of course, was stressed by the Federal District Court in *Stradley* v. *Anderson* (cert. 23a), as the reason for outweighing the individual police officer's personal rights. District Judge Denney states that, "Grooming standards, as part of uniform regulations, are a legitimate State interest" (cert. 34a). The decision was appealed and the Eighth Circuit affirmed the decision (cert. 29a).

A second legitimate State interest advanced by the Suffolk County Police Department was safety. A demonstration was given at a hearing before District Court Judge Mishler that an officer could be pulled off his feet easily in an assault situation (A. 15-16), whether it be because of a beard (A. 17) or the length of hair on his head interfering with the operation of a police vehicle during a pursuit chase (A. 19) and that it further interfered with the head gear (A. 19) which is part of the uniform. As a finding of fact, Judge Mishler did find that the wearing of pony tails would be dangerous (cert. 7a) and it is to be noted that *no witness* testified to the *contrary* as to any of these facts. The Court took it upon itself to substitute its judgment for the police department as to whether or not the length of hair of an individual police officer could indeed be a safety factor. Once safety was asserted as a legitimate State interest and testimony was heard to substantiate that interest, the Suffolk County Police Department had sustained their burden of showing a legitimate State interest and the burden was upon the plaintiffs to come forward with evidence contrary to the arguments advanced by the Suffolk County Police Department. No such testimony was elicited nor did the plaintiffs proffer any testimony at all. The Court was clearly in

error, then, in subsequently declaring the regulation unconstitutional. The Circuit Court was equally in error in affirming the decision of Justice Mishler.

With respect to the issue of safety, the same Circuit Court of Appeals has deemed a regulation dealing with firemen to be constitutionally permissible where safety was advanced as the "legitimate State interest". (*Kamerling et al.* v. *O'Hagen*, 512 F. 2d 443 (2d Cir. 1975).) If one examines the preface to the hair regulation in that case, it speaks of safety of the firemen. The present hair regulation of the Suffolk County Police Department makes no such statement, but testimony at the hearing advances the same purpose. Would the regulation of the Suffolk County Police Department have been upheld by the Second Circuit if it had such a preface? It would seem so based on the reasoning of *Kamerling, supra.* It is then absurd for the same court to issue two different rulings on what is essentially the same argument. A uniformed police officer is no less a civil servant than the *uniformed* fire fighter. Indeed, the police officer is the visible sign of law enforcement where the fireman's duties are confined to fight fires—an essential and worthy occupation—but *not* as representative of the law as the policeman!

In *Kamerling, supra,* the Court stated that there was unquestioned interest of the City of New York in the health and safety of its fire fighters, and therefore a hair regulation was proper. Was there any less concern by the Suffolk County Police Department for its individual officers? I think not—and again, there was no rebuttal testimony to show that safety was *not* a reason for having a hair regulation by the Suffolk County Police Department.

III

Since the State Courts had considered a virtually identical grooming regulation and sustained its validity, the Federal District Court and the Court of Appeals should have refrained from ruling on the identical issues.

The "Pullman Abstention" policy wherein the Federal Courts will abstain from interfering with certain areas being developed in the State Courts came about as a result of *Railroad Comm'n.* v. *Pullman Co.,* 312 U.S. 496 (1941). The Supreme Court of the United States held, in substance, that if a claim in the Federal Courts is based upon an unsettled question of State law, the Federal Court should allow the State Court to resolve the issues. The Supreme Court has expanded the policy in the case of *Younger* v. *Harris,* 401 U.S. 37 (1971), wherein the Court stated that if injunctive relief is sought in the Federal Courts against pending State criminal proceedings, the Federal Courts should deny such relief not on the merits but simply to allow the State Courts to function on their own without unnecessary Federal Court interference.

More recently the policy of abstention was expanded to encompass State proceedings even where the case is civil in nature. The case of *Lawrence S. Huffman* v. *Pursue, Ltd.,* —— U.S. ——, 43 L. Ed. 2d 482, 95 S. Ct. 1200 (1975), involved an Ohio public nuisance statute which stated that exhibition of certain obscene films could subject an owner of the premises it was being shown at to having his establishment closed up for a year. Pursuant to that statute, the State of Ohio commenced a civil proceeding in the State courts and obtained a judgment against the owner and he was ordered to close his premises for one year. Instead of pursuing the appeal process in the State courts, the owner sought and obtained Federal injunctive relief under 42 U.S.C. Sec. 1983. The Federal District Court

went even further and declared the statute unconstitutional. On review before the Supreme Court of the United States, the Court reversed the District Court decision and remanded it to that Court to look at the case again—but this time to follow the principles of *Younger* v. *Harris,* 401 U.S. 37 (1971). (See also, *Harris County Commissioner's Court* v. *Moore,* —— U.S. ——, 43 L. Ed. 2d 32, 95 S. Ct. 870 (1975).)

Now one may well argue that neither the petitioner nor the respondent in the instant case ever resorted to the State courts and therefore the Pullman Abstention Doctrine has no application. It does have application if, as the Suffolk County Police Department contends, its sister county had been subjected to State proceedings. (*Greenwald* v. *Frank,* 70 Misc. 2d 632, 334 N.Y.S. 2d 680, affd. 40 A.D. 2d 717, 337 N.Y.S. 2d 225, affd. 32 N.Y. 2d 862, 346 N.Y.S. 2d 529 (1973).) The grooming regulation was virtually identical. A reading of all the opinions in the *Greenwald* case, *supra,* can leave no doubt that the constitutional issues were resolved in that case and the State's highest court affirmed the lower courts. That affirmance was on May 30, 1974. The Court of Appeals for the Second Circuit was well aware of the opinion and even referred to it in its decision (Cert. 15a).

Since the underlying issues in *Greenwald* were identical to the instant case and the issues had been resolved in the State courts, the Second Circuit should have affirmed the dismissal of the complaint or dismissed it of its own accord for failure to state a claim upon which any relief could be granted. The underlying principle of the "Pullman Abstention" doctrine is, of course, the concept of comity, i.e., a proper respect for State functions. (*Younger* v. *Harris,* 401 U.S. at 43.) The constitutional questions were considered in *Greenwald, supra,* and while not using that language, it is clear that the State courts did not feel the grooming of hair was a substantial constitutional right

and properly disposed of the issues. Moreover, they found that since a police department is quasi-military in nature and the regulation on its face was not unreasonable, it was allowed to stand.

IV

Since the Suffolk County Police Department is quasi-military in character, the reasoning applied in the military cases have more application than that of the school cases.

The Second Circuit concluded in its initial opinion that the Suffolk County Police Department was not para-military or quasi-military. Interestingly enough, in discussing the history of civilian police departments, the Court cites Taft & England's "Criminology, 4th Ed." as an authority for its conclusion. The Court, however, missed the language used by the very same authors in describing police department structure when they state that:

> "To perform its basic repressive function effectively, a police force requires a semi-military type of organization permitting the commissioner or chief to control and be responsible for the entire program." (*Supra,* p. 326.)

Even in Lee's "A History of Police In England" (1971) which the Second Circuit also relied on does not support their view that the police are not quasi-military as the author speaks of police discipline as encompassing obedience and respect for lawful authority (Lee, A History of Police In England, 1971, p. 402).

There is, of course, no precedent by this Court or indeed other courts except for *Stradley* v. *Anderson, supra,* upon which the Suffolk County Police Department relies to ad-

vance the argument that police are different from school children. The closest analogy would be the reasoning in the military cases.

The Second Circuit in 1970, in *Gianatasio* v. *Whyte,* 426 F. 2d 908 (2d Circ. 1970), Cert. Den. 400 U.S. 941, 91 S. Ct. 234, 27 L. Ed. 2d 244, held in effect that the military had wide discretion in regulating hair length of its members. The argument asserted by Gianatasio was that since he was a National Guard member and only periodically came to meetings and the rest of the time he worked as a manager of a Shoe Bazaar, that longer hair was essential to his work. The Court, citing its previous decision of *Raderman* v. *Kaine,* 411 F.2d 1102 (2d Cir. 1969), decided in favor of the military. (To the same effect, *Anderson* v. *Laird* (7th Circ. 1971), 437 F.2d 912, Cert. Den. 404 U.S. 865, 92 S. Ct. 68, 30 L. Ed. 2d 109; *Doyle* v. *Koelbl,* 434 F. 2d 1014 (5th Circ. 1970).)

The inconsistency in reasoning between the various courts regarding hair length is readily seen by the Seventh Circuit decision. In *Breen* v. *Kahl, supra,* a case involving school children and the right of a school board to regulate hair of students, the choice of one's hair length is equated to a fundamental personal right protected by either the First, Ninth or Fourteenth Amendment. The case was decided in 1969. Two years later the same Circuit when confronted with the military's right to regulate hair finds no justification to warrant that court's interference with the discretionary decision of the military (*Anderson* v. *Laird, supra*). It is even more apparent that the Second Circuit in *Gianatasio* v. *Whyte, supra,* and *Raderman* v. *Kaine, supra,* takes a similar position that the military may regulate hair lengths and implies there is no substantial consitutional right to personal appearance simply because one is in the military.

Since the police function on a semi or quasi-military basis, the same reasoning in the military cases should apply

that the Police Commissioner should have the wide range of latitude in grooming standards. In the military, the individual is subjected to rigid discipline as to the hours of employment, the clothes he wears, the grooming of both the clothes and himself, and even so far as his personal time off from his duties. A police officer is assigned a rotating tour of duty, generally of eight hours a day, and shifts change weekly. He is required to wear a blue uniform, black socks, tie, black shoes and a hat. He has to report for duty and is, of course, paid for his job. He has been, prior to this case, subject to grooming standards. The Police Commissioner, in his discretion, has deemed certain grooming of the police officer essential or at least part of the uniform.

Does not the individual officer have under the Fourteenth Amendment the right to choose the color of his clothes? Why must he wear a uniform? Why, indeed, cannot he ever wear a uniform but individualize it so that his personal liberty is not overshadowed by his employer?

The military has deemed good grooming to be one of the essential ingredients to an effective military and yet, no one would really argue as to whether or not the soldier in the field is more effective clean shaven than he is with a five-day growth. So, too, the Suffolk County Police Department deems good grooming essential to the effecetiveness of the Department's visibility to the criminal and the public. It is important to note that both the military and the police do not attempt to abolish the growth of hair from the human body since it would be readily apparent that that growth is so intermingled with bodily functions as to possibly be protected under the Constitution—whatever Amendment. It is not the growth but the *grooming of the growth* that the Suffolk County Police Department sought to regulate.

When Thomas Dwen chose to become a Suffolk County Police Officer he was required to take and pass a civil

service examination consisting of a written test along with a medical test and also a testing for physical agility. Upon being accepted into the Suffolk County Police Department, he had to undergo training at the Police Academy, which is not dissimilar to boot camp in the military. If Mr. Dwen had previously been unaware of the duties of police officers (which is unlikely since, again, the police officer is *the* most visible sign of law enforcement known to the public), he certainly became aware of them during that training. He voluntarily took a civil service test. He voluntarily passed all physical and medical standards. He voluntarily went through a Police Academy under rigorous training. He voluntarily subjected himself not only to performing a job but to all of the rules and regulations of the Suffolk County Police Department as promulgated by the Police Commissioner. Now, even accepting the premise that the grooming of hair *is* a personal right protected by the Constitution, can one say that Mr. Dwen has not knowingly and intelligently waived that right once he became a police officer?

He certainly waived his right to wearing any type of clothing he chooses to wear on the job as well as the hours he wishes to work or the assignments he chooses to accept. Each individual, no matter what type of employment, subjects himself to some infringement upon what he may regard as personal rights. The requirment, for instance, to wear uniforms is a requirement not only of police but generally of firemen, postal workers, parcel post workers, forest rangers, Parks Department employees, Court officers, etc. Indeed, for the bald-headed person, the only true expression of individuality may be in his style of dress of clothes, because he is unable to grow long hair—and yet he, too, if he is employed in one of the above positions, must accept the infringement on his "personal rights" so that he will have a paycheck to pursue those "rights" on his own leisure time.

The argument may, of course, well be advanced that at least with respect to clothes, the individual may shun the uniform at five o'clock and wear whatever he chooses where the same is untrue with hair—he cannot grow and ungrow it. The interference, however, with his personal appearance is minimal at best. He may wear his hair in any style he chooses after he is off duty. In any event, the length of hair as governed by the regulation is always subject to a Court test of arbitrariness so that a regulation requiring the men be shaved bald may be reviewed by the Courts as to its reasonableness. (See dissent of Justice Shapiro in *Greenwald* v. *Frank, supra,* 337 N.Y.S. 2d 225, 231.)

Further, the very same PBA that initiated the present suit has recently characterized itself as quasi-military as the statement by its present president stated in an affidavit submitted in a case challenging certain physical standards for police officers wherein he states at paragraph 11 of his petition:

> "11. That it is a well accepted premise that a police department is a quasi-military organization entrusted with the responsibility of enforcing the laws of its jurisdiction and protecting the rights and property of all citizens."
>
> (*Johnson, Individually and as President of the Suffolk County Patrolman's Benevolent Association, Inc.* v. *Klein, et al.*, Supreme Court, Suffolk County, Index No. 75-2487, Decided, May 28, 1975). (Unreported)

The grooming standard set forth in 2.16 of the Rules and Procedures of the Suffolk County Police Department is one of many rules which limit the individual officer's "personal rights". A member of the force must be available for duty and must leave a number where he can be

contacted by his commanding officer (E. 38). He must have respect for superior officers and others and give his rank, name, shield number and command to anyone requesting same (E. 38) and must maintain decorum when appearing in a Court by wearing his uniform (E. 39).

He is required to pay his debts promptly (E. 42); forbidden to have personal business cards which would show his association with the Department (E. 42); cannot join a Federal or State military organization without permission of the Commissioner of Police (E. 44); and when required to march, must do so in accordance with United States Infantry Drill Regulations (E. 43).

The individual officer is further required not to smoke in public unless in a restaurant or a Department vehicle (E. 55) and does not indulge in intoxicants while in uniform (E. 55). He is further required to wear a prescribed uniform and it must be maintained in a neat, clean and serviceable condition (E. 77). A specific section requires even the color of socks to be black (E. 77). Summer and winter uniforms are prescribed (E. 78) including the wearing of gloves (E. 79-80). A department insignia must be worn on the uniform at a prescribed place (E. 80).

A vast organizational structure is specifically detailed in the Rules and Procedures of the Suffolk County Police Department similar to the military (E. 5-37). The designation of the individuals to tasks under the same ranks as in the military are evidence of the similarity to military structure (e.g., captain, lieutenant, sergeant—E. 81). The duties of each individual's assignments are specifically stated in military fashion (Patrolman, E. 122; Desk Officer, E. 138; Supervising Officer, E. 144; Commanding Officer, E. 149; Executive Officer, E. 160). The individual officer is required to salute the national colors (E. 111) and even upon his decease is entitled to a color guard, honor guard and pallbearers (E. 113). Depending upon

his rank at the time of decease, he may be entitled to have anywhere from 1 sergeant and 12 police officers to 1 inspector, 2 captains, 4 lieutenants, 8 sergeants and 72 police officers present at his funeral. Dying in the line of duty would automatically entitle him to the latter (E. 115).

The police officer cannot leave his post during his tour of duty except with permission of a superior officer (E. 133); must maintain a memorandum book of all activities while on duty (E. 135); and is entitled to various medals for honor and bravery (E. 117).

As further evidence of the semi-military structure of the organization, each police officer must carry his shield at *all* times (E. 86) ***and*** an authorized identification card (E. 91). He may not even on his own personal time (i.e., after his tour of duty) associate with persons known to have been convicted of *any* misdemeanor or felony, excluding traffic violations (E. 56).

Reference is further made in the Rules (E. 46-47) to Section 426 of the Election Law of the State of New York, which in substance makes it a misdemeanor for a police officer to contribute money to a political party or become a member of any political club, association, society or committee.

Now, with reference to all of the above rules and procedures, the individual officer under Rule 5.8 is required to study the rules and procedures and is to be bound by them (E. 56). Violation of the rules will subject him to disciplinary proceedings which could result in a reprimand, fine, suspension or even dismissal (E. 93-108).

The excerpts from the Rules and Procedures of the Suffolk County Police Department are evidence of a semi-military structure. The grooming standard is just one of a number of requirements that may infringe on an individual's subjective choices, whether it be the type of

clothing, his smoking habits, his friends or membership in political clubs. It cannot be set apart from the entire rules and regulations since the purpose of the rules is that they operate to have a single uniformed body of men governed by uniform rules of conduct. To selectively separate one of those rules of conduct and state that the individual police officer's personal choice of grooming is a substantial constitutional right undermines the entire structure and procedures of the Suffolk County Police Department.

If it is a substantive constitutional right for the officer to determine the length of his hair, then it is equally a substantive constitutional right that he be allowed to smoke when and where he wishes, that his membership in a political party cannot be forbidden, that he not be obliged to wear certain color uniform, that he maintain that uniform in a neat condition or that he be required to be neat and clean at all times, salute his fellow officers, etc.

The Rules and Regulations of the Suffolk County Police Department are fashioned after military rules because the organization is run in a semi-military fashion. There is no compulsion that an individual become a member of the Suffolk County Police Department. He voluntarily applies for the position and goes through the usual civil service testing procedure. Once a police officer, he must comply with the rules and procedures. Failure to comply results in disciplinary procedures similar to the military. The grooming standard is part and parcel of the entire rules and to set it apart from the rest of the rules as a substantive constitutional right is an unwarranted interference by the Federal Courts in the orderly administration of the Suffolk County Police Department.

The Federal District Court for the Eastern District of New York erred in declaring the grooming standard regulation of the Suffolk County Police Department unconstitutional and the Second Circuit Court of Appeals was

equally in error in affirming the District Court's decision. If the choice of personal appearance—including hair length—is a fundamental right the Commissioner of Police of the Suffolk County Police Department sustained his burden of proof by advancing two legitimate State interests and the complaint should have been dismissed. The complaint further should have been dismissed on the basis that since the Suffolk County, Police Department is quasi-military in character, the reasoning of the military cases should have been ample reason for the Court to dismiss the complaint.

Further, the "right" of choice of personal appearance is not such a fundamental "right" as to be afforded constitutional protection and the complaint should have been dismissed on that basis. If any reasonable interpretation can be given to the restriction of hair length it would be that it is a lesser "right" and in that case the District Court for the Eastern District of New York and the Second Circuit Court of Appeals erred in placing the heavy burden of proof on the Police Commissioner and should have merely applied the rational relationship test.

Lastly, since New York State's highest court had already ruled on the constitutionality of the regulation, the Federal Court should have abstained from interfering with a problem already resolved in the State Courts.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the complaint dismissed.

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Respectfully submitted,

HOWARD E. PACHMAN
Suffolk County Attorney
Attorney for Petitioner
Office and P. O. Address
H. Lee Dennison Executive
Office Bldg.
Veterans Memorial Highway
Hauppauge, New York 11787
Telephone: (516) 979-2485

PATRICK A. SWEENEY
Of Counsel
691 Fort Salonga Road
Northport, New York 11768
(516) 757-6515